

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHELE CAROL BEAN,

Defendant-Appellant.

UNPUBLISHED

January 11, 2007

No. 263034

Missaukee Circuit Court

LC No. 04-101862-FH

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right her convictions of two counts of larceny by conversion of \$20,000 or more, MCL 750.362, and two counts of common-law fraud, MCL 750.280, at a jury trial. She was sentenced to serve concurrent jail terms of 365 days and 60 months' probation for each count. We reverse.

On January 14, 2004, defendant and her husband Ronald Bean were parties to a meeting of creditors in relation to their bankruptcy proceedings. During that meeting, defendant's husband made a number of statements indicating that he had taken money given to him by friends to be invested on their behalf, and instead used that money to pay personal household bills and mortgage payments.¹ Throughout this creditors' meeting, defendant frequently answered questions or offered corrections or additions to answers given by her husband. However, defendant did not comment on the answers given by her husband that explained how he had spent money entrusted to him to invest.

Prior to defendant's trial, aware that the prosecutor intended to call two witnesses who had questioned defendant and her husband at that creditors' meeting, defense counsel objected to that testimony on hearsay grounds. The prosecutor argued that testimony was admissible under MRE 801(d)(2)(B), which excludes party admissions from the definition of hearsay; the prosecutor reasoned that defendant's failure to correct her husband's statements about using the investment money for household expenses, in light of the fact that she corrected her husband's

¹ For example, Ronald Bean stated in answer to a question from one person who gave him money to invest: "I spent the money on bills." Ronald Bean then clarified: "it was two months on my house payments."

answers at various other points during the creditors' meeting, made his statements hers as adoptive admissions.

The trial court held that the jury would be instructed concerning the proposed testimony that it could not consider what Ronald Bean said at the creditors' meeting unless the jury unequivocally found that defendant had adopted Ronald's statements during the meeting. However, the trial court did not make a preliminary determination under MRE 104(b) that there was sufficient proffered evidence that defendant had adopted those statements.

Defendant argues on appeal that the trial court improperly admitted the purported hearsay testimony because it failed to make a preliminary determination under MRE 104(b) that defendant had adopted those statements. We agree.

A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). When a question of law exists regarding the admissibility of evidence based on a statute or rule of evidence, that question is reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Preserved, nonconstitutional evidentiary error will not merit reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Id.* at 495-496.

Under MRE 801(d)(2)(B), a statement is not hearsay but is rather an admission by a party opponent if the statement is offered against a party and is a statement of which the party has manifested an adoption or belief in its truth. *People v Solmonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004). A statement is: "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a); *Solmonson*, *supra* at 666.

The statements at issue here were made by defendant's husband, Ronald Bean, in answer to questions about what he had done with money given him to invest. For example, the exchange between Ronald Bean and one party who questioned him during the creditors' meeting included the following:

MS. COTTRELL: Did you ever plan on paying me back before the bankruptcy, at the time that we had our contract for our investment?

MR. BEAN: I had every – every intention of paying until WorldCom filed bankruptcy, which killed the deal where that I had the money coming, yes.

MS. COTTRELL: So what did you do with the money that I gave you?

MR. BEAN: I paid bills.

MS. COTTRELL: Okay. What bills did you pay?

MR. BEAN: Personal bills, living expense, entertaining for Prepaid Legal.

The issue here is whether the oral assertions of Ronald Bean may also be attributed to defendant. We conclude that they cannot.

Under MRE 104(b)², to determine the relevance of the evidence at issue here, the trial court must first have determined whether the condition rendering the statements adoptive admissions was fulfilled, meaning whether defendant indeed manifested assent to her husband's statements during the creditors' meeting.³ Here the trial court failed to make this 104(b) preliminary factual determination.

Upon de novo review of the record, we find there was not sufficient evidence to indicate that defendant adopted her husband's statements as her own. The statements fail the threshold 104(b) test, are not adoptive admissions, and are therefore clearly testimonial hearsay not within any exception or exclusion. "An adoptive admission is the express adoption of another's statement as one's own. It is conduct on the part of a party which manifests circumstantially that party's assent in the truth of a statement made by another." *Shemman v American Steamship Co*, 89 Mich App 656, 673; 280 NW2d 852 (1979) (citation omitted). While defendant did, through words and conduct, expressly agree with some statements made by her husband during the creditors' meeting, and similarly did expressly disagree with other statements, we cannot agree that these actions render the entirety of defendant's husband's testimony during that meeting admissions adopted by defendant.

"In order to find adoptive approval of the other's statement the circumstances surrounding the other's declaration must be examined." *Shemman, supra* (citation omitted). In this case, the prosecutor argues that because defendant corrected or clarified her husband's answers at various points during the meeting, defendant must have intended to acquiesce by silence to all other statements. We find that it is just as likely, however, that defendant only spoke to matters about which she had direct knowledge, suggesting that where she remained silent, her husband spoke only for himself. In any case, we hold that defendant did not, by her silence and inaction during portions of the creditors' meeting, "unambiguously assent" to all statements made by her husband. *Lowe, supra*. These testimonial hearsay statements were inadmissible as a matter of law, and it was an abuse of discretion to allow them.

² MRE 104(b): "Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

³ Although decided prior to adoption of the Michigan Rules of Evidence in 1978, we find persuasive *People v Lowe*, 71 Mich App 340, 346; 248 NW2d 263 (1976) (finding that whether a party "understood and unambiguously assented" to a statement is a preliminary question for the court).

Here, the complainants testified that they gave defendant or Ronald Bean money that the complainants intended to be invested. The complainants testified that no documentation of the investment was provided, and that their money was never returned. However, only Ronald Bean's statements made during the creditors' meeting indicate that defendant and Ronald used the money for their own personal use and did not invest it. Larceny by conversion includes as an element that the defendant "converted to his or her own use" the property of another.⁴ We find that the erroneously admitted hearsay statements were clearly outcome determinative because they are the only evidence tending to establish this element of the crime charged. *Lukity, supra* at 495-496.

In light of this dispositive ruling, we need not address defendant's remaining issues on appeal.

Reversed.

/s/ Stephen L. Borrello

/s/ Janet T. Neff

/s/ Jessica R. Cooper

⁴ Larceny by conversion requires: (1) the property at issue had some value; (2) the property belonged to someone other than the defendant; (3) someone delivered the property to the defendant; (4) the defendant embezzled, converted to his or her own use, or hid the property with the intent to embezzle or fraudulently use it; and (5) at the time the property was embezzled, converted, or hidden, the defendant intended to defraud or cheat the owner permanently of the property. *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001).